

CHRISTOPHER O'NEILL,	)	3:12-cv-00030-LRH-WGC
	)	
Plaintiff,	)	<b><u>REPORT &amp; RECOMMENDATION</u></b>
	)	<b><u>OF U.S. MAGISTRATE JUDGE</u></b>
vs.	)	
	)	
DR. ROBERT BANNISTER, et. al.	)	
	)	
Defendants.	)	
	)	
	)	

After a thorough review, the court recommends that Defendants' motion be granted.

At all relevant times Plaintiff Christopher O'Neill was an inmate in custody of the Nevada Department of Corrections (NDOC). (Pl.'s Compl. (Doc. # 4) at 1.) The events giving

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1 rise to this litigation took place while Plaintiff was housed at Ely State Prison (ESP). (*Id.*)  
2 Plaintiff, a pro se litigant, brings this action pursuant to 42 U.S.C. § 1983. (*Id.*) Defendants are  
3 Dr. Robert Bannister, Dr. Karen Gedney, Dr. Michael Koehn, John Peery, and Sandra Snider.<sup>2</sup>  
4 (Screening Order (Doc. # 3).)  
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6 On screening, the court determined Plaintiff states colorable claims against Defendants in  
7 Counts I through III under the Eighth Amendment for deliberate indifference to a serious  
8 medical need related to the treatment of his hepatitis C. (Doc. # 3.)  
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10 Specifically, Plaintiff alleges that Defendants have known he has hepatitis C for eighteen  
11 years. (Doc. # 4 at 3.) In Count I, Plaintiff alleges that on January 20, 2011, Dr. Gedney  
12 answered Plaintiff's request asking about a treatment plan for his condition by stating, "there is  
13 no rush to consider treatment." (Doc. # 4 at 4.) Plaintiff claims he informed Dr. Gedney that he  
14 was experiencing pain and fatigue as a result of his condition, but she refused to provide him  
15 treatment. (*Id.*)  
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17 In Count II, Plaintiff alleges that on February 10, 2011, he filed a grievance regarding his  
18 hepatitis C and the lack of treatment for his painful symptoms. (Doc. # 4 at 5.) He asserts that  
19 defendant Snider responded to the grievance by telling Plaintiff that his liver enzymes were  
20 within normal limits and denied any medical care. (*Id.*) He contends that his lab results in fact  
21 showed his liver enzymes were elevated; therefore, defendant Snider was not truthful in her  
22 response. (*Id.*) Plaintiff then received a first level grievance response from defendant Peery,  
23 whom he asserts also denied treatment. (*Id.*) Finally, Plaintiff received a second level grievance  
24 response from Dr. Bannister, agreeing with the responses to the informal and first level  
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28 <sup>2</sup> Mistakenly named by Plaintiff as Susan Snider.

1 grievances. (*Id.*) He contends their responses were deliberately indifferent to his serious medical  
2 need.

3 In Count III, Plaintiff alleges that on November 22, 2011, he was seen by Dr. Koehn  
4 regarding his elevated liver enzymes and extreme pain. (Doc. # 4 at 6.) Dr. Koehn performed an  
5 examination and confirmed Plaintiff's liver was swollen as a result of hepatitis C and that was  
6 causing his pain. (*Id.*) However, Dr. Koehn told Plaintiff that he does not treat hepatitis C and  
7 Plaintiff would just have to "tough it out." (*Id.*) Plaintiff alleges that Dr. Koehn ended the exam  
8 without providing treatment for his condition. (*Id.*)  
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11 Plaintiff previously moved for a preliminary injunction related to treatment for his  
12 condition. (Doc. # 10.) Specifically, he sought an order that Defendants have him evaluated by a  
13 liver specialist and that a liver biopsy be performed. (*Id.*) Plaintiff's motion was denied on the  
14 basis that Plaintiff had not demonstrated a likelihood of success on the merits, likelihood of  
15 irreparable injury in the absence of the issuance of an injunction, that injunctive relief was in the  
16 public interest or that the balance of hardships weighed in his favor. (Doc. # 34 (Report &  
17 Recommendation for denial of Pl.'s request); Doc. # 64 (Order adopting Report &  
18 Recommendation)). Plaintiff appealed this decision to the Ninth Circuit. (Doc. # 65.) The Ninth  
19 Circuit affirmed the court's decision denying Plaintiff's request for injunctive relief. (Doc. # 99.)  
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22 Defendants now move for summary judgment, arguing: (1) there is no evidence of  
23 deliberate indifference; instead, Defendants have provided Plaintiff with appropriate care and  
24 have continued to monitor his condition; (2) Plaintiff's official capacity damages claims against  
25 Defendants must be dismissed; and (3) Defendants are entitled to qualified immunity. (Doc. #  
26 89.)  
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1 Plaintiff has opposed the motion, arguing that he did not receive adequate care or  
 2 treatment for his condition from Dr. Gedney, Nurse Snider, Nurse Peery, Dr. Bannister or Dr.  
 3 Koehn.

## 4 II. LEGAL STANDARD

5 “The purpose of summary judgment is to avoid unnecessary trials when there is no  
 6 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18  
 7 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). All reasonable inferences are drawn in favor  
 8 of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v.*  
 9 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Summary judgment is appropriate if “the  
 10 pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no  
 11 genuine issue as to any material fact and that the movant is entitled to judgment as a matter of  
 12 law.” *Id.* (quoting Fed.R.Civ.P. 56(c)).<sup>1</sup> Where reasonable minds could differ on the material  
 13 facts at issue, however, summary judgment is not appropriate. *See Anderson*, 477 U.S. at 250.  
 14 The moving party bears the burden of informing the court of the basis for its motion, together  
 15 with evidence demonstrating the absence of any genuine issue of material fact.  
 16 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Although the parties may submit evidence  
 17 in an inadmissible form, only evidence which might be admissible at trial may be considered by  
 18 a trial court in ruling on a motion for summary judgment. Fed.R.Civ.P. 56(c).

19 In evaluating the appropriateness of summary judgment, three steps are necessary:  
 20 (1) determining whether a fact is material; (2) determining whether there is a genuine issue for  
 21 the trier of fact, as determined by the documents submitted to the court; and (3) considering that

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22 <sup>1</sup>Federal Rule of Civil Procedure 56 was amended in 2010 to state: “The court shall grant summary judgment if the  
 23 movant shows that there is no genuine *dispute* as to any material fact and the movant is entitled to judgment as a  
 24 matter of law.” (Emphasis added.) The analysis under the cases cited, however, remains the same.  
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1 evidence in light of the appropriate standard of proof. *See Anderson*, 477 U.S. at 248-250. As to  
2 materiality, only disputes over facts that might affect the outcome of the suit under the governing  
3 law will properly preclude the entry of summary judgment; factual disputes which are irrelevant  
4 or unnecessary will not be considered. *Id.* at 248.

6 In determining summary judgment, a court applies a burden shifting analysis. “When the  
7 party moving for summary judgment would bear the burden of proof at trial, ‘it must come  
8 forward with evidence which would entitle it to a directed verdict if the evidence went  
9 uncontroverted at trial.’ [ ] In such a case, the moving party has the initial burden of establishing  
10 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*  
11 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations  
12 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or  
13 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate  
14 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving  
15 party failed to make a showing sufficient to establish an element essential to that party’s case on  
16 which that party will bear the burden of proof at trial. *See Celotex*, 477 U.S. at 323-25. If the  
17 moving party fails to meet its initial burden, summary judgment must be denied and the court  
18 need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S.  
19 144, 160 (1970).

23 If the moving party satisfies its initial burden, the burden shifts to the opposing party to  
24 establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
25 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
26 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
27 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’  
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1 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*,  
 2 809 F.2d 626, 630 (9th Cir. 1987)(quotation marks and citation omitted). The nonmoving party  
 3 cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported  
 4 by factual data. *Id.* Instead, the opposition must go beyond the assertions and allegations of the  
 5 pleadings and set forth specific facts by producing competent evidence that shows a genuine  
 6 issue for trial. *See* Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324.

8 At summary judgment, a court’s function is not to weigh the evidence and determine the  
 9 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.  
 10 While the evidence of the nonmovant is “to be believed, and all justifiable inferences are to be  
 11 drawn in its favor,” if the evidence of the nonmoving party is merely colorable or is not  
 12 significantly probative, summary judgment may be granted. *Id.* at 249-50, 255 (citations  
 13 omitted).

### 16 **III. DISCUSSION**

#### 17 **A. Eighth Amendment Deliberate Indifference to Serious Medical Need**

18 A prisoner can establish an Eighth Amendment violation arising from deficient medical  
 19 care if he can prove that prison officials were deliberately indifferent to a serious medical need.  
 20 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). “The requirement of deliberate indifference is less  
 21 stringent in cases involving a prisoner’s medical needs than in other cases involving harm to  
 22 incarcerated individuals because “[t]he State’s responsibility to provide inmates with medical  
 23 care ordinarily does not conflict with competing administrative concerns.”” *McGuckin v. Smith*,  
 24 974 F.2d 1050, 1060 (9th Cir. 1992), *rev’d on other grounds*, *WMX Tech., Inc. v. Miller*, 104  
 25 F.3d. 1133 (9th Cir. 1997). “In deciding whether there has been deliberate indifference to an  
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1 inmate's serious medical needs, [the court] need not defer to the judgment of prison doctors or  
2 administrators." *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989).

3 A finding of deliberate indifference involves the examination of two elements: "the  
4 seriousness of the prisoner's medical need and the nature of the defendant's responses to that  
5 need." *McGuckin*, 974 F.2d at 1059; *see also Akhtar v. Mesa*, 698 F.3d 1202, 1213 (9th Cir.  
6 2012) (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)). "A 'serious' medical need  
7 exists if the failure to treat a prisoner's condition could result in further significant injury or the  
8 'unnecessary and wanton infliction of pain.'" *McGuckin*, 974 F.2d at 1059 (citing *Estelle*, 429  
9 U.S. at 104); *see also Akhtar*, 698 F.3d at 1213. Examples of conditions that are "serious" in  
10 nature include "an injury that a reasonable doctor or patient would find important and worthy of  
11 comment or treatment; the presence of a medical condition that significantly affects an  
12 individual's daily activities; or the existence of chronic and substantial pain." *McGuckin*, 974  
13 F.2d at 1059-60; *see also Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (quoting  
14 *McGuckin* and finding that inmate whose jaw was broken and mouth was wired shut for several  
15 months demonstrated a serious medical need).

16 If the medical need is serious, the plaintiff must show that the defendant acted with  
17 deliberate indifference to that need. *Estelle*, 429 U.S. at 104; *Akhtar*, 698 F.3d at 1213 (quoting  
18 *Jett*, 439 F.3d at 1096). "Deliberate indifference is a high legal standard." *Toguchi v. Chung*,  
19 391 F.3d 1051, 1060 (9th Cir. 2004). Deliberate indifference entails something more than  
20 medical malpractice or even gross negligence. *Id.* Inadvertence, by itself, is insufficient to  
21 establish a cause of action under § 1983. *McGuckin*, 974 F.2d at 1060. Instead, deliberate  
22 indifference is only present when a prison official "knows of and disregards an excessive risk to  
23 inmate health or safety; the official must both be aware of the facts which the inference could be  
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1 drawn that a substantial risk of serious harm exists, and he must also draw the inference.”

2 *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *see also Akhtar*, 698 F.3d at 1213 (quoting *Jett*,  
3 439 F.3d at 1096) (This second prong...is satisfied by showing (a) a purposeful act or failure to  
4 respond to a prisoner’s pain or possible medical need and (b) harm caused by the indifference.”).

5  
6 “Prison officials are deliberately indifferent to a prisoner’s serious medical needs when  
7 they deny, delay, or intentionally interfere with medical treatment” or the express orders of a  
8 prisoner’s prior physician for reasons unrelated to the medical needs of the prisoner. *Hunt*, 865  
9 F.2d 198, 201 (9th Cir. 1989) (internal quotation marks and citation omitted). In addition, it  
10 “may be shown by the way in which prison officials provide medical care.” *Crowley v.*  
11 *Bannister*, --- F.3d ---, 2013 WL 5813178, at \* 9 (quoting *Jett v. Penner*, 439 F.3d 1091, 1096  
12 (9th Cir. 2006), *overruled on other grounds by WMX Techs, Inc. v. Miller*, 104 F.3d 1133 (9th  
13 Cir. 1997) (en banc)) (internal quotation marks omitted). Where delay in receiving medical  
14 treatment is alleged, a prisoner must demonstrate that the delay led to further injury. *McGuckin*,  
15 974 F.2d at 1060.  
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18 “A difference of opinion between a physician and the prisoner-or between medical  
19 professionals-concerning what medical care is appropriate does not amount to deliberate  
20 indifference.” *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012) (citing *Sanchez v. Vild*, 891  
21 F.2d 240, 242 (9th Cir. 1989)). Instead, to establish deliberate indifference in the context of a  
22 difference of opinion, the inmate “must show that the course of treatment the doctors chose was  
23 medically unacceptable under the circumstances” and that the course of treatment was chosen “in  
24 conscious disregard of an excessive risk to [the prisoner’s] health.” *Id.* at 988 (quoting *Jackson v.*  
25 *McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)).  
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1 **B. Analysis**

2 Defendants do not dispute that Plaintiff's hepatitis C constitutes a serious medical need.  
3 (See Doc. # 97 at 2:13-14.) Therefore, the court need only address whether they are entitled to  
4 summary judgment on Plaintiff's claim that their conduct amounts to deliberate indifference.  
5

6 **1. Dr. Gedney**

7 Plaintiff claims Dr. Gedney was deliberately indifferent when she responded to a medical  
8 kite dated January 18, 2011. In the kite, Plaintiff asked the following:

9 What is the treatment plan for my Hepatitis C? You have been aware of the  
10 infection in me for over 18 years yet so far no treatment. I suffer from side effects  
11 including joint pain and fatigue. Should you inoculate me for Hep. A & B? I  
12 would like to know my treatment plan.  
(See Doc. # 91-2 at 43.)

13 On January 20, 2011, Dr. Gedney responded: "There is no rush to consider treatment. I  
14 would not treat until all your problems resolved and treatment recommendations would initiate  
15 from ESP." (*Id.*)

16 In support of her motion for summary judgment, Dr. Gedney has submitted her own  
17 declaration. (Doc. # 89-1 at 23-25.) Dr. Gedney is a Senior Physician with NDOC's Regional  
18 Medical Facility located at Northern Nevada Correctional Center (NNCC). (*Id.* at 23 ¶ 2.) She is  
19 a member of the hepatitis C Committee as well as the Utilization Review Committee, and as  
20 such she reviews medical records of inmates who are being submitted to receive medical  
21 treatment, including drug therapy for hepatitis C. (*Id.* at 24 ¶ 3.)

22 According to Dr. Gedney, hepatitis C is a viral infection which primarily affects the liver  
23 and while the infection is often asymptomatic, a chronic infection can lead to damage of the  
24 liver. (Doc. # 89-1 at 24 ¶ 4.) Drug therapy can be provided to persons infected with hepatitis C,  
25 however some genotypes of the virus are more resistant to drug therapy than others, and the drug  
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1 therapy in and of itself poses significant risks, including death. (*Id.* ¶ 9.) As a result, drug therapy  
2 is not prescribed and administered without "extensive evaluation of the progression of an  
3 individual's infection, the individual's psychological and mental state, and the overall general  
4 health of the individual." (*Id.*)

5  
6 Dr. Gedney admits that she responded to Plaintiff's kite on January 20, 2011, and in  
7 preparing her response she reviewed his medical records, including his lab results, and formed  
8 the opinion that he should not receive drug therapy treatment, which she reflected in her response  
9 when she told him there was no rush to consider treatment. (*Id.* at 25 ¶ 11.) Additionally, she  
10 asserts that she was not Plaintiff's primary provider at the time, and informed him treatment  
11 recommendations would come from his medical providers at ESP. (*Id.*)

12  
13 She indicates that she reviewed Plaintiff's medical records again in late 2011, when he  
14 was submitted to the hepatitis C committee. (*Id.* ¶ 12.) At that time, she states that his medical  
15 testing and objective indicators did not support a recommendation of drug therapy for his  
16 condition. (*Id.*) She states this decision was further supported by the finding that his particular  
17 genotype was 1a which is more resistant to drug therapy than other genotypes. (*Id.*)

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19 Her ultimate opinion is that in 2011, Plaintiff was not an appropriate candidate for drug  
20 therapy for hepatitis C and the decision to delay treatment and continue to monitor his condition  
21 was medically acceptable and medically advisable. (*Id.* ¶ 13.)

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23 Plaintiff has been referred to the committee again for evaluation of whether drug therapy  
24 is appropriate, and that evaluation is currently under consideration. (*Id.* ¶ 14.)<sup>3</sup>

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27 <sup>3</sup> As of the date of the submission of memoranda pertaining to Defendants' motion, the court has not been advised  
28 of the committee's determination. Even if the committee had denied Plaintiff treatment it would not impact the  
court's analysis as Plaintiff has not alleged a claim against the committee members in this regard.

1 Plaintiff's claim against Dr. Gedney essentially demonstrates a difference of opinion as he  
2 is challenging her decision in 2011 to continue to monitor his condition and delay any treatment  
3 as compared to his desire for drug therapy or some other form of treatment. There is no evidence,  
4 however, that this decision was medically unacceptable under the circumstances and was chosen  
5 in conscious disregard of an excessive risk to Plaintiff's health.  
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7 Moreover, Plaintiff's assertion in his opposition that Dr. Gedney denied him treatment for  
8 his condition because he was violent appears to be unfounded and based on nothing more than  
9 Plaintiff's mere speculation. Plaintiff even provides Dr. Gedney's responses to his interrogatories  
10 where he asked Dr. Gedney if she informed another prison that Plaintiff was not receiving  
11 hepatitis treatment because she thinks he is violent and she responded in the negative. (Doc. #  
12 96-1 at 6.)  
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14 Plaintiff also argues that Dr. Gedney inappropriately bases her denial of treatment in  
15 January of 2011 on the fact that Plaintiff's hepatitis C genotype was 1a when his genotype was  
16 not even identified until December 2011. (Doc. # 96 at 3.) Dr. Gedney did not base her response  
17 to Plaintiff's January 2011 kite on Plaintiff's genotype. Instead, she states that *later in 2011* it was  
18 determined that his genotype was 1a, which further supports the decision to delay drug therapy  
19 treatment. (Doc. # 89-1 at 25 ¶ 12.)  
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21 In sum, the court cannot conclude Dr. Gedney was deliberately indifferent to Plaintiff's  
22 medical condition, and as such recommends that summary judgment be granted in her favor.  
23

## 24 **2. Nurse Snider**

25 Plaintiff's claim against defendant Snider is centered on her response to a grievance  
26 where Plaintiff requested treatment for his condition and she responded that his liver enzymes  
27 were within normal limits and denied him any medical care. (Doc. # 4 at 5.)  
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1 In the informal level grievance, which is set forth as an exhibit to Defendants' motion,  
2 Plaintiff requests medical attention for his hepatitis C. (Doc. # 89-1 at 20-21.) The response  
3 states: "Your liver enzymes are within normal limits. We will continue to monitor you.  
4 Grievance Denied." (*Id.* at 19.)

5  
6 In support of the motion for summary judgment, defendant Snider has submitted her own  
7 declaration. (Doc. # 89-1 at 32-33.) Defendant Snider is a registered nurse, and at all relevant  
8 times was employed by NDOC as Director of Nursing Services I at NNCC. (*Id.* at 32 ¶ 2.) As  
9 part of her duties, she was responsible for responding to informal grievances relating to medical  
10 issues. (*Id.* ¶ 3.) She admits she prepared a response to Plaintiff's informal level grievance  
11 (grievance number 20062918147). (*Id.* at 33 ¶ 4.) In preparing her response, she asserts that she  
12 reviewed his medical records, including his lab results. (*Id.*) She told Plaintiff at the time his  
13 liver enzymes were within normal limits and that NDOC medical staff would continue to  
14 monitor his health and the progression of his disease. (*Id.* ¶ 5.)

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17 Plaintiff argues that in fact his liver enzyme levels were elevated, and so defendant  
18 Snider was deliberately indifferent when she stated otherwise and denied his informal level  
19 grievance. To support this argument, Plaintiff submits defendant Snider's responses to requests  
20 for admissions he propounded. Plaintiff first asked defendant Snider to admit that attachment A  
21 to his requests is a copy of a medical kite showing Plaintiff's liver enzyme levels. (Doc. # 96-1 at  
22 105, Request for Admission No. 5.) Subject to various objections, she responds that the  
23 laboratory results written on the kite attached by Plaintiff are consistent with laboratory testing  
24 results for Plaintiff dated **September 29, 2011**. (*Id.*, response to Request for Admission No. 5.)

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27 Plaintiff then asks defendant Snider to admit that her response to Plaintiff's grievance  
28 stating that his liver enzyme levels were within normal levels was a lie. (*Id.*, Request for

Admission No. 6.) Subject to various objections, defendant Snider's response is a denial and she states that she responded to Plaintiff's grievance on **April 13, 2011**, and laboratory testing performed on Plaintiff on **February 25, 2011 and October 7, 2010** indicated that his liver enzymes (referred to medically as AST [SGOT] and ALT [SGPT])<sup>4</sup> were within normal limits, while the document attached to Plaintiff's requests contains results from **September 29, 2011**, five months *after* she wrote her grievance response.

Thus, at the time defendant Snider wrote her response to Plaintiff's informal level grievance, she was correct that his liver enzyme levels were within normal limits. As such, there is no evidence this response was in conscious disregard to an excessive risk to Plaintiff's health. Accordingly, summary judgment should be granted in defendant Snider's favor.

### 3. Nurse Peery

Plaintiff's claim against defendant Peery is based on his response to Plaintiff's first level grievance regarding the lack of treatment for his condition. (Doc. # 4 at 5.)

Nurse Peery's first level grievance response states:

Mr. O'Neill,

Like most medications, the treatment for Hepatitis C is not without risk. In the event that disease such as yours is not active enough to cause liver enzyme rise, indicating more active disease, physicians will not elect to treat [you] because the disease is not curable. If you had an active or fulminate disease state, as indicated by an elevation of these enzymes, then I'm sure the physicians would consider you for treatment. In consideration of treatment, you would have to have your particular Hepatitis genotyped to see if you were even a candidate for therapy (some genotypes do not respond to therapy). Even when someone has the proper genotype for treatment, if they do not respond with a certain huge decrease in virus count, the therapy is stopped because of the potential of more harm than good, or simply not good enough reaction to warrant the risk. The answer you got in the informal grievance was therefore accurate, just not as detailed as this one, and I hope this answer will allow you to understand why your grievance is denied.

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<sup>4</sup> The medical records as well as Dr. Bannister's responses to Plaintiff's discovery indicate that generally a normal score for the AST liver enzyme is between zero and forty and a normal score for the ALT liver enzyme is between zero and fifty-five. (*See, e.g.*, Doc. # 96-1 at 32, 45-46.)

(Doc. # 89-1 at 17.)

In support of the motion for summary judgment, defendant Peery has submitted his own declaration. (Doc. # 89-1 at 35-36.) During the relevant time period, defendant Peery was employed by NDOC as Director of Nursing Services II at NNCC, and was responsible for responding to first level grievances regarding medical issues. (*Id.* at 35 ¶¶ 2-3.) He admits to responding to Plaintiff's first level grievance (grievance number 20062918147) after reviewing Plaintiff's medical records, including his lab results. (*Id.* at 36 ¶ 4.) In his response, he explained that medical treatment for hepatitis C is not without risks and that the progression of his disease at the time was not active enough to warrant drug therapy treatment. (*Id.* ¶ 5.) In addition, he explained that the evaluation of whether to utilize drug therapy depends in large part on the particular genotype because certain genotypes do not respond to drug therapy. (*Id.*)

The sole basis for Plaintiff's deliberate indifference claim against defendant Peery. Is this grievance response where Defendant Peery provided Plaintiff with a fairly detailed explanation for the perceived lack of treatment he was receiving for his hepatitis C. He told Plaintiff that his liver enzymes were not elevated so as to indicate a progression of the disease, and even if they were, drug therapy has its own risks. He went on to explain that in addition certain genotypes do not respond well to drug treatment. The court simply cannot conclude that this response evidences deliberate indifference to Plaintiff's condition; therefore, summary judgment should be granted in defendant Peery's favor.

#### **4. Dr. Bannister**

Plaintiff's claim against Dr. Bannister centers on Dr. Bannister's response to Plaintiff's second level grievance concerning a lack of treatment for his condition. (Doc. # 4 at 5.)

1 Plaintiff's second level grievance states that his enzyme levels have been above the  
2 highest limit, that his symptoms have increased, and that NDOC has not checked his genotype to  
3 find out if he is a candidate for drug therapy. (Doc. # 89-1 at 15.) He states that he wants a more  
4 in depth review of possible treatment. (*Id.* at 16.) Dr. Bannister's response to the second level  
5 grievance states: "Agree with the response provided at the first level. Please continue to follow  
6 up with Medical at ESP." (*Id.* at 14.)

8 Dr. Bannister has likewise submitted his own declaration in support of the motion for  
9 summary judgment. (Doc. # 89-1 at 38-40.) Dr. Bannister was formerly employed as NDOC's  
10 Medical Director, and was responsible for responding to second level grievances related to  
11 medical issues. (*Id.* at 38 ¶¶ 2-4.) He admits that he responded to Plaintiff's second level  
12 grievance (grievance number 20062918147) after reviewing Plaintiff's medical records. (*Id.* at 39  
13 ¶ 5.) He also reviewed defendant Snider's and defendant Peery's responses to Plaintiff's informal  
14 and first level grievances. (*Id.* ¶ 6.) He informed Plaintiff that he agreed with the response given  
15 by defendant Peery to Plaintiff's first level grievance. (*Id.* ¶ 7.) He further instructed Plaintiff to  
16 follow up with his medical care providers at ESP. (*Id.*)

19 This second level grievance response is the only basis for Plaintiff's deliberate  
20 indifference claim against Dr. Bannister. Dr. Bannister states that he reviewed Plaintiff's medical  
21 records as well as the lower level grievance responses of defendants Snider and Peery, in  
22 preparing this response. As noted above, Defendant Peery's first level grievance response  
23 explained, in some detail, why Plaintiff was not receiving further treatment for his condition. In  
24 addition, Dr. Bannister told Plaintiff that he should continue to follow up with his medical  
25 providers at ESP. As the court concluded with respect to defendants Snider and Peery, this  
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1 second level grievance response does not evidence the knowing disregard of an excessive risk to  
2 Plaintiff's health. Accordingly, summary judgment should be granted in Dr. Bannister's favor.

### 3 **5. Dr. Koehn**

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5 With respect to Dr. Koehn, Plaintiff alleges that on November 22, 2011, he was seen by  
6 Dr. Koehn, who stated that Plaintiff's liver was swollen as a result of his hepatitis C, but told  
7 Plaintiff he does not treat hepatitis C and Plaintiff would just have to "tough it out." (Doc. # 4 at  
8 6.)

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10 Dr. Koehn also submits his declaration in support of the motion for summary judgment.  
11 (Doc. # 89-1 at 27-30.) Dr. Koehn is a physician at ESP. (*Id.* at 27 ¶ 2.) He relays that in August  
12 2010, Plaintiff had surgery to repair an inguinal hernia, and after the surgery Plaintiff expressed  
13 multiple complaints of pain, including that the pain extended into his abdomen. (*Id.* at 28 ¶ 8.) In  
14 2011, Plaintiff began expressing complaints of back pain and other generalized complaints of  
15 pain in his abdomen and legs. (*Id.* ¶ 9.) He states that during this time, he and the medical  
16 providers at NNCC, attempted to identify the cause of Plaintiff's pain and provide appropriate  
17 pain management. (*Id.*)

18  
19 He acknowledges that he conducted an examination of Plaintiff on November 22, 2011.  
20 (*Id.* at 28-29 ¶ 10.) During the examination, Plaintiff expressed complaints of back and  
21 abdominal pain. (*Id.*) Based on the examination, Dr. Koehn noted that Plaintiff may have "mild  
22 inflammation of the hepatic capsule" which "may or may not be related to his infection with  
23 Hepatitis C." (*Id.*) As a result of this examination, he referred Plaintiff to see Dr. Mar for  
24 consideration for a referral to a pain management specialist, ordered the refill of his medications  
25 and ordered that his hepatitis C genotype be identified. (*Id.*) Plaintiff's genotype was identified as  
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28



1 genotype 1a. (*Id.*) Following this examination, Dr. Koehn monitored Plaintiff's medical condition  
2 while he was housed at ESP. (*Id.*)

3 Dr. Koehn claims that on the many occasions he has seen Plaintiff since 2011, he has  
4 explained to Plaintiff the implications of his genotype and drug therapy treatment, discussed and  
5 explained his lab results and what they indicate with respect to the progression of his disease as  
6 well as whether drug therapy would potentially be appropriate. (*Id.* ¶ 12.)

7  
8 As a general practitioner at ESP, Dr. Koehn cannot order drug therapy for hepatitis C but  
9 can refer patients to the hepatitis C committee and Utilization Review Panel for consideration for  
10 drug therapy treatment. (*Id.* ¶ 13.) In December 2011, Dr. Koehn did direct that Plaintiff be  
11 referred to the hepatitis C committee for consideration for drug therapy treatment, but he was  
12 denied treatment at that time, although he was to be reconsidered in a year. (*Id.* ¶¶ 14-15.) Since  
13 that time, Dr. Koehn indicates that Plaintiff has received several blood tests to continually  
14 monitor the progression of his disease. (*Id.* ¶ 15.)

15  
16 On April 9, 2013, Dr. Koehn ordered Plaintiff admitted to the ESP infirmary for  
17 observation for possible blood in his stool and evaluation of his abdominal pain. (*Id.* ¶ 16.) Part  
18 of the medical testing ordered in April 2013 was to determine whether Plaintiff's hepatitis C  
19 infection was progressing to a stage where it would be appropriate for treatment, to determine  
20 whether there were objective indications of damage to his liver, and to identify whether there  
21 were indications of the development of cancer to the liver. (*Id.* at 30 ¶ 17.) All medical testing  
22 came back with results not indicating significant progression of his hepatitis C. (*Id.*)

23  
24 As a precaution, Dr. Koehn ordered an abdominal ultrasound in May of 2013, to provide  
25 a diagnostic tool to evaluate Plaintiff's liver and abdominal organs in an attempt to diagnose his  
26 complaints of pain to his abdomen. (*Id.* ¶ 18.)  
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28

1 He has nonetheless referred Plaintiff to the hepatitis C committee again for consideration  
2 for drug therapy treatment. (*Id.* ¶ 20.) His medical records indicate that the labs were sent to the  
3 hepatitis C committee on January 3, 2012 and March 7, 2013. (Doc. # 91-1 at 26.)

4  
5 Plaintiff, on the other hand, argues that Dr. Koehn has failed to provide him with  
6 adequate treatment to address his condition.

7 Even taking as true Plaintiff's allegation that Dr. Koehn told him to "tough it out" after  
8 the November 22, 2011 examination, Dr. Koehn's conduct subsequent to this examination does  
9 not evidence deliberate indifference to Plaintiff's condition. In fact, Plaintiff was seen multiple  
10 times for complaints of pain, and notes indicate that discussions were had regarding Plaintiff's  
11 condition and genotype. (Doc. # 91-1 at 34-35.) Dr. Koehn referred Plaintiff to the hepatitis C  
12 committee (*id.* at 36), and it was explained to Plaintiff that treatment was deferred by the  
13 committee for a year due to "lack of concerning labs." (*Id.* at 34; *see also* Doc. # 96-2 at 9.) The  
14 decision not to enroll Plaintiff in treatment was made by the hepatitis C Committee and not Dr.  
15 Koehn. (*Id.*)

16  
17  
18 Following the deferral of treatment by the hepatitis C committee, Plaintiff continued to be  
19 examined and evaluated for complaints of pain to his abdomen. (Doc. # 91-1 at 28, 44-49; Doc. #  
20 96-2 at 10, 11.)

21  
22 In early January 2013, Plaintiff's lab results showed that his liver enzyme results were  
23 elevated. (*See* Doc. # 96-2 at 14 (AST level of 7, ALT level of 102).) When Plaintiff complained  
24 of pain, he was examined several times, admitted to the infirmary, and was referred again to the  
25 hepatitis C committee. (*See* Doc. # 96-2 at 15-18, 21-36.) At the time of the filing of the motion,  
26 the referral was still under consideration by the committee.  
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1 The court cannot conclude that Dr. Koehn's conduct amounts to deliberate indifference.  
2 Plaintiff has received ongoing care from Dr. Koehn and the staff at ESP. Dr. Koehn has  
3 examined and evaluated Plaintiff when he complains of pain, has admitted him to the infirmary  
4 when necessary, ordered an ultrasound of his abdomen to try to determine the source of his  
5 abdominal pain, and has referred Plaintiff again to the hepatitis C committee which will  
6 determine whether he will receive further treatment in the form of drug therapy for his condition.  
7 Whether he ultimately receives this treatment is not Dr. Koehn's decision. As such, Plaintiff's  
8 claim against Dr. Koehn amounts to a difference of opinion and he has not presented evidence  
9 that Dr. Koehn's course of conduct was medically unacceptable under the circumstances or in  
10 conscious disregard of an excessive risk to Plaintiff's health. Therefore, summary judgment  
11 should be granted in Dr. Koehn's favor.

12 Because the court has recommended granting summary judgment in favor of all  
13 defendants as to all remaining claims, it need not reach the official capacity damages or qualified  
14 immunity arguments advanced by the defense.

#### 15 **IV. RECOMMENDATION**

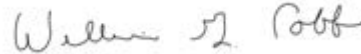
16 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order **GRANTING**  
17 Defendants' motion for summary judgment (Doc. # 89).

18 The parties should be aware of the following:

19 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local  
20 Rules of Practice, specific written objections to this Report and Recommendation within fourteen  
21 (14) days of receipt. These objections should be titled "Objections to Magistrate Judge's Report  
22 and Recommendation" and should be accompanied by points and authorities for consideration by  
23 the District Court.

1           2. That this Report and Recommendation is not an appealable order and that any notice of  
2 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
3 until entry of the District Court's judgment.  
4

5 **DATED: January 6, 2014.**

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8 **WILLIAM G. COBB**  
9 **UNITED STATES MAGISTRATE JUDGE**  
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